(10) (11)

Nos. 85-971 and 85-972

FILED
JUN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT L. CLARKE, COMPTROLLER OF THE CURRENCY, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

SECURITY PACIFIC NATIONAL BANK, PETITIONER

v.

SECURITIES INDUSTRY ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PETITIONER

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QUESTIONS PRESENTED

1. Whether an association of securities brokers, underwriters, and investment bankers has standing to challenge the application of the McFadden Act's branching limitations, 12 U.S.C. 36(c), to national banks.

2. Whether offices of national banks that offer only discount brokerage services are "branches" within the meaning of Section 7(f) of the McFadden Act, 12 U.S.C. 36(f).

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12 U.S.C. 36(c)(2) 2
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S. Rep. 95-1073, 95th Cong., 2d Sess. (1978) 37-38
Whitehead, *Regional Forces for Interstate Banking*, Fed. Res. Bank of Atlanta Econ. Rev. 4 (May 1983) 36

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is reported at 758 F.2d 739. The order and opinion of the court of appeals respecting denial of the suggestion for rehearing en banc (Pet. App. 4a-9a) is reported at 765 F.2d 1196. The opinion of the district court (Pet. App. 10a-29a) is reported at 577 F. Supp. 252.

JURISDICTION

The judgment of the court of appeals (Pet. App. 48a-49a) was entered on April 12, 1985. A petition for rehearing was denied on July 12, 1985 (Pet.

App. 4a-9a). On October 1, 1985, the Chief Justice extended the time for filing a petition for a writ of certiorari to November 9, 1985. On November 1, 1985, the Chief Justice further extended the time for filing the petition to and including December 9, 1985. The petition for a writ of certiorari was filed on that date and was granted on March 3, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set forth at App., *infra*, 1a-2a.

STATEMENT

1. a. Section 7(c) of the McFadden Act (the Act) (12 U.S.C. 36(c)) authorizes any national bank to establish branch offices in the state in which it is located. It may do so, however, only to the extent that "such establishment and operation are at the time authorized to State banks by the statute law of the State in question." 12 U.S.C. 36(c)(2). See generally *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 253 (1966).[1] By its terms, this geographical limitation does not restrict the operation of all national bank offices; it applies only to the operation of national bank "branches," which are defined by Section 7(f) of the Act (12 U.S.C. 36(f)) "to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which deposits are received, or checks paid, or money lent."

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[1] In addition, a national bank may branch within its home city "if such establishment and operation [of branches] are at the time expressly authorized to State banks by the law of the State in question." 12 U.S.C. 36(c)(1).

In 1982, two national banks, Union Planters National Bank of Memphis (Union Planters) and Security Pacific National Bank of Los Angeles (Security Pacific), applied to the Comptroller of the Currency for permission to open offices that would offer discount brokerage services to the public.[2] Security Pacific's application stated that these services initially would be offered at Security Pacific's established branch offices throughout California, and eventually would be provided at nonbranch offices in California and other states. Pet. App. 11a. Union Planters' application stated that it planned to acquire Brenner Steed & Associates, Inc. (Brenner Steed), an existing discount brokerage firm, and that it intended to offer Brenner Steed's services at selected Union Planters branches in Tennessee, as well as at locations in six other states (*id.* at 10a-11a).

On August 26, 1982, the Comptroller approved Security Pacific's application, concluding that bank offices offering only discount brokerage services are not "branches" within the meaning of the Act, and therefore are not subject to the Act's geographical restrictions on the locations where national bank offices may operate.[3] The Comptroller first noted that

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[2] Discount brokers execute trades on behalf of their customers but do not offer investment advice. As a result, the commissions they charge are substantially lower than those charged by full-service brokers. See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 1 n.2.

[3] The Comptroller also found that Security Pacific's provision of discount brokerage services was not barred by the Glass-Steagall Act (12 U.S.C. (& Supp. II) 24; 12 U.S.C. 78, 377, 378). Pet. App. 31a-39a. Respondent's challenge to this ruling was rejected by the district court (*id.* at 13a-20a) and

the term "branch" is "statutorily defined to include" any place " 'at which deposits are received, or checks paid, or money lent.' " Pet. App. 39a (quoting 12 U.S.C. 36(f)). He then determined that Security Pacific's discount brokerage offices would not receive deposits, pay checks, or make loans (Pet. App. 39a-43a), and thus would not fall within the statutory definition.

Although this conclusion sufficed to establish that the operation of discount brokerage offices away from chartered branches would not run afoul of the Act, the Comptroller also addressed the question whether those offices nevertheless "could be found by a court to be branches within the meaning of the McFadden Act" under *any* reading of the statute (Pet. App. 43a). He concluded that they could not. Even if the Act were read to provide that some bank offices that do not perform even one of the three services enumerated in Section 36(f) are branches, the Comptroller explained, such offices "should at the very least" offer services involving "dealings with the public requiring a specialized banking or similar license" (Pet. App. 43a-44a). Discount brokerage operations do not fall into this category. Indeed, the Comptroller explained that it would be inconsistent with settled practice in the banking industry to find that securities brokerage activities constitute a branch banking function, because a substantial "number of banks currently operat[e] U.S. government or municipal securities dealer offices that transact business with the public at non-branch locations

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by the court of appeals (*id.* at 2a); respondent's petition for a writ of certiorari (No. 85-392) from the Glass-Steagall aspect of the court of appeals' decision was denied by this Court on January 13, 1986.

on both an intra state and interstate basis." *Id.* at 44a.[4]

2. In response to the Comptroller's decisions, respondent, a trade association representing securities brokers, underwriters, and investment bankers (see Pet. App. 10a), brought this action in United States District Court for the District of Columbia. Among other things (see note 3, *supra*), respondent contended that bank discount brokerage offices are branches within the meaning of Section 36(f) and thus are subject to the geographical restrictions imposed by Section 36(c). Respondent therefore argued that discount brokerage services may be offered by national banks—including Security Pacific and Union Planters—only at their central offices or at licensed branches.

In relevant part, the district court ruled for respondent. The court first held that respondent had standing to challenge the Comptroller's implementation of the Act. Although the court acknowledged that the Act was passed "to equalize competi[ti]on between state and national banks" (Pet. App. 20a), it nevertheless held that respondent's claim fell "within the zone of interests protected by the McFadden Act" (*id.* at 23a).[5] Relying on *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970) and *Association of Data Processing Service Organizations* v. *Camp*,

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[4] Shortly after issuing this opinion, the Comptroller approved without comment Union Planters' application to acquire Brenner Steed (Pet. App. 47a).

[5] The court also found that respondent had demonstrated that it will suffer actual harm from the Comptroller's ruling, pointing to respondent's allegation "that its members' profits will suffer if national banks are allowed to operate brokerage subsidiaries in competition with them" (Pet. App. 23a).

397 U.S. 150 (1970), which held that bank competitors may challenge the implementation of the Bank Service Corporation Act (12 U.S.C. 1861-1867), the district court reasoned that there is no need for "any explicit expression in the statute or its legislative history for the court to find that [respondent] is within the [Act's] zone of interests" (Pet. App. 23a). It was enough, in the court's view, that the Act, read in conjunction with the National Bank Act of 1864, "evince[d] the intent of Congress to curb the scope of national banks' activities" (Pet. App. 24a). If national banks succeed in avoiding these curbs, the court stated, respondent's members will be injured "just as" the bank competitors in *Arnold Tours* and *Data Processing Organizations* had been harmed.

On the merits, the court rejected the Comptroller's conclusion that national bank offices offering only discount brokerage services are not branches. The court did not disagree with the Comptroller's finding that such offices offer none of the three banking services enumerated in Section 36(f) (that is, the receipt of deposits, the payment of checks, or the making of loans). Instead, the court took issue with the Comptroller's primary conclusion that the Act's branching restrictions apply *only* to bank offices that perform at least one of the three activities listed in the statutory definition. The court noted that Representative McFadden, in post-enactment remarks, described the term "branch" to include a bank office that "transact[s] any business carried on at the main [bank] office" (Pet. App. 26a, quoting 68 Cong. Rec. 5816 (1927) (emphasis omitted)). And the district court read this Court's holding in *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122

(1969), as requiring "a broader, more flexible interpretation * * * of the statute than that followed by the Comptroller" (Pet. App. 26a).

The district court therefore ruled that the "brokerage business * * * is within the category of 'general business' which national banks may conduct at their main office and, as such, is subject to the branching restrictions" (Pet. App. 28a). The court accordingly invalidated the Comptroller's ruling to the extent that it permitted Union Planters and Security Pacific to offer discount brokerage services at nonbranch locations.

In a brief per curiam opinion, the court of appeals affirmed the district court's ruling, "generally for the reasons stated" by the district court (Pet. App. 2a). Judge Scalia dissented from the McFadden Act aspect of this holding, arguing that the district court had "conflate[d] the constitutional requirement of injury in fact and the separate requirement that 'Congress [have] intended to place the plaintiffs within the zone of interests protected or regulated by the statute' " (Pet. App. 3a (quoting *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083, 1090 (D.C. Cir. 1984), cert. denied, No. 84-362 (Nov. 26, 1984)). In Judge Scalia's view, only "state banks and possibly federal banks" are within that zone (Pet. App. 3a). He therefore would have dismissed respondent's claims under the Act for lack of jurisdiction.

The Comptroller's petition for rehearing en banc[6] was denied (Pet. App. 4a-5a) over a dissent by Judge Scalia, joined by Judges Bork and Starr. Judge Scalia repeated his criticism of the court's holding on standing, finding it "uncontroverted that

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[6] Security Pacific intervened and filed its own petition for rehearing en banc.

[the Act's] purpose was to establish competitive equality between state and federal banks * * *. Thus, state banks (and state banking commissions) are obviously within the zone of interests protected by the statute—but the brokerage houses suing in the present case are no more within it than are businesses competing for the parking spaces that an unlawful branch may occupy" (*id.* at 6a). In these circumstances, Judge Scalia reasoned, the court's ruling "entirely reduces the 'zone of interest' inquiry under the McFadden Act to an inquiry into 'injury in fact'" (*id.* at 6a-7a).

Judge Scalia also took issue with the court's holding on the merits. He noted that discount brokerage services are not one of the activities enumerated in Section 36(f), and that the remarks of Congressman McFadden relied upon by the district court were "made after passage of the Act." Pet. App. 8a. Judge Scalia also found this Court's ruling in *Plant City*, which described the Section 36(f) definition as "'suggest[ing] a calculated indefiniteness'" (Pet. App. 8a, quoting 396 U.S. at 135 (emphasis omitted)), to be "virtually dispositive *in favor of the Comptroller*" (Pet. App. 8a (emphasis in original)), since such a definition "presents precisely the situation in which [the court's] deference to the agency should be at its height" (*ibid.*).

SUMMARY OF ARGUMENT

A. At the outset, the courts below erred in holding that respondent has standing to assert its claim under the Act. This Court repeatedly has explained that a litigant is entitled to have a claim heard on the merits only when the claim falls within the "zone of interests" protected or regulated by the statute

in question. This zone of interests requirement, like the other prudential limitations on standing, safeguards separation of powers principles by ensuring that persons who were consciously excluded from the administrative process will not be able to manipulate the statutory scheme to achieve purposes outside the contemplation of Congress. At the same time, application of the zone test serves to ensure the complete adversarial presentation of the relevant issues before the court.

Because the inquiry in a zone of interests case focuses on the relationship between the congressional purpose and the plaintiff's interests, resolution of that inquiry turns on the legislative purpose. And here, the usual indicia of congressional intent—the statutory language and legislative history—plainly show that respondent falls well outside the zone of interests protected by the Act. On its face, 12 U.S.C. 36(c) imposes limits on national banks entirely in terms of the conduct authorized to state banks by state law, which suggests that Congress did not intend to protect securities brokers or other bank competitors when it passed the Act. And this proposition is unambiguously confirmed by the legislative history, which establishes that the Act was intended to ensure "competitive equality" between state and national banks by guaranteeing "that neither [banking] system have advantages over the other in the use of branch banking." *First National Bank in Plant City* v. *Dickinson*, 396 U.S. 122, 131 (1969). Any benefits that respondent obtains from the Act's branching restrictions are thus entirely incidental to the purposes of the statute.

Against this background, the courts below relied on two decisions according standing to bank competitors, *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45 (1970)

and *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970), to hold that respondent's claim falls within the zone of interests protected by the Act. But that reliance was misplaced. In *Arnold Tours* and *Data Processing Organizations*, the Court simply concluded that Congress, in the statute at issue, "*had* provided competitor standing." *United States* v. *Richardson*, 418 U.S. 166, 176 n.9 (1974) (emphasis added). Indeed, it was central to the Court's holding in those cases that the statute there involved—in contrast to the McFadden Act—had not been designed to benefit only a single group of bank competitors. Here, where Congress intended to regulate only the type of competitive injury that state and national banks might inflict upon one another, there is no reason to depart from the congressional purpose—particularly when doing so would simply afford respondent's members a windfall and unintended protection from the normal competition of the marketplace.

B. 1. The court of appeals' holding on the merits —which casts doubt on the validity of longstanding and widespread practices in the banking industry—also cannot be reconciled with the language and legislative history of the Act. Section 36(f) defines the term "branch" to "include" any bank office "at which deposits are received, or checks paid, or money lent." As the Comptroller explained in detail, discount brokerage offices perform none of these functions—and therefore cannot be deemed to be branches within the meaning of the statute. Section 36(f)'s use of the term "include" did not give the courts below license to disregard the three enumerated functions: that term relates not to the activities performed by a bank at a given office but to the *places* at which the specified activities are carried on.

Again, the legislative history confirms that the Act means what it says. Debate on the Act centered almost exclusively on the concern that national banks might obtain monopoly control over credit and the money supply if permitted to branch; because it is through the receipt of deposits, the cashing of checks, and the making of loans that credit and money are controlled, it is not surprising that congressional discussion about the appropriate scope of restrictions on branching referred only to bank offices that perform those functions. In contrast, during the three years that the Act was under consideration, no suggestion was made that its branching limitations would affect the *nonbanking* activities of national banks.

The legislative background also makes plain that the omission of brokerage operations from the functions enumerated in Section 36(f) could not have been an oversight. Congress was fully aware, at the time of the Act's adoption in 1927, that national banks had long been engaged in the buying and selling of securities on an interstate basis. Yet in the same legislative package in which it defined the term "branch" and established Section 36(c)'s branching rules, Congress specifically confirmed the authority of national banks to continue to engage in the buying and selling of investment securities. Had Congress intended to require that these activities be performed only at licensed branches in the bank's state of incorporation, it presumably would have said so.

2. In disregarding the Comptroller's construction of Section 36(f), the courts below relied on *Plant City*, which suggested that the Act's definition of "branch" contains "a calculated indefiniteness with respect to the outer limits of the term." 396 U.S. at 135. In *Plant City* itself, however, the Court held the

bank facility at issue to be a branch because it performed one of the statutorily enumerated functions (the taking of deposits); the Court specifically declined to decide whether bank offices that do not perform one of those functions ever may be branches. Moreover, as Judge Scalia noted in dissent, if the statutory definition does contain a "calculated indefiniteness," deference to the views of the agency charged with the Act's administration should be at its height. Indeed, the propriety of the Comptroller's reading of the Act is confirmed by the banking industry's longsettled and widespread practice of operating nonbanking offices on an interstate basis—a practice that has been expressly noted by Congress.

In any event, even if the three functions enumerated in Section 36(f) are not the only ones that characterize branches, the courts below erred in holding that *all* bank operations must be conducted at branch facilities. The three functions listed in the statute must have at least some bearing on the definition of the term branch; their inclusion in Section 36(f) otherwise would have been wholly superfluous. And what the three have in common is each one's status as a basic banking service. Against this background, as the Comptroller explained, even the broadest reading of Section 36(f) must limit branches to those bank offices that require a specialized banking or similar license. This distinction between basic bank services and the more peripheral activities that are performed by banks is hardly novel: in 12 U.S.C. (Supp. II) 24 Seventh, for example, Congress distinguished the "business of banking" from the "business of dealing in securities and stock." The courts below thus erred in failing to defer to the Comptroller's careful distinction between traditional bank services and discount brokerage operations.

ARGUMENT

THE COURTS BELOW ERRED IN OVERTURNING THE COMPTROLLER'S DETERMINATION THAT BANK OFFICES OFFERING ONLY DISCOUNT BROKERAGE SERVICES ARE NOT BRANCHES WITHIN THE MEANING OF THE McFADDEN ACT

Both aspects of the rulings below are flawed by a basic misunderstanding of the meaning of the McFadden Act. The purposes of that statute are unambiguous: it was written to assure competitive equality between national and state banks in the provision of basic banking services. Nonbanking entities such as respondent that wish to obtain windfall relief from the competition offered by national banks are thus wholly outside the zone of interests protected or regulated by the Act. And even apart from the question of standing, the language and legislative history of the Act—which are bolstered by the Comptroller's consistent administrative interpretation of the statute—squarely establish that the Act's branching restrictions apply only to bank offices that accept deposits, cash checks, or make loans. Offices that engage in the buying and selling of securities plainly do not fall into this category.

A. Respondent Does Not Have Standing To Challenge The Comptroller's McFadden Act Ruling Because Its Claim Does Not Fall Within The Zone Of Interests Protected Or Regulated By The Act

Before a plaintiff is accorded the right to sue in federal court, he must do more than claim "injury in fact." Even "apart from [satisfying] the 'case' or 'controversy' test" (*Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, 153 (1970)), the litigant must establish that his claim

"fall[s] within 'the zone of interests to be protected or regulated by the statute * * * in question.'" *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Data Processing Organizations*, 397 U.S. at 153). This Court repeatedly has explained that satisfaction of the zone of interests requirement is a prerequisite to a finding of standing.[7] In applying the test, the Court has thus indicated that if Congress "intended to protect" a given category of litigants, those litigants "would be within the zone of interests protected by [the statute at issue] and would therefore have standing to bring an action" to enforce that statute; if the statute were "intended only to protect" a different group of persons, however, "there would be no need to provide [the first category of litigants] with any remedy at all." *Brock* v. *Pierce County*, No. 85-385 (May 19, 1986), slip op. 7 n.7. And here, respondent plainly is unable to establish that it is "within the class of persons that the statutory provision was designed to protect." *Data Processing Organizations*, 397 U.S. at 155.

1. a. The zone of interest requirement, like other prudential limitations on standing, bears a "close

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[7] See *Allen* v. *Wright*, No. 81-757 (July 3, 1984), slip op. 12; *Gladstone, Realtors* v. *Village of Bellwood*, 441 U.S. 91, 100 n.6 (1979); *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-321 n.3 (1977); *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 n.19 (1976); *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 227 n.16 (1974); *United States* v. *Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 n.13 (1973); *Sierra Club* v. *Morton*, 405 U.S. 727, 733 & n.5 (1972); *Investment Co. Institute* v. *Camp*, 401 U.S. 617, (1971); *Barlow* v. *Collins*, 397 U.S. 159 (1970).

relationship to the policies reflected in" Article III's case or controversy requirement. *Valley Forge*, 454 U.S. at 475. See *Glass Packaging Institute* v. *Regan*, 737 F.2d 1083, 1088 (D.C. Cir. 1984). It thus serves largely to safeguard separation of powers principles, by "secur[ing] the benefits of a statutory program for the groups that Congress intended to benefit." *Leaf Tobacco Exporters Ass'n* v. *Block*, 749 F.2d 1106, 1111 (4th Cir. 1984). Because "it is primarily the province of Congress to consider and weigh the interests of those potentially affected by legislation and subsequent administrative action," application of the zone test ensures that persons consciously excluded from the administrative process will not be able to manipulate the statutory scheme to achieve purposes outside the contemplation of Congress. *Branch Bank & Trust Co.* v. *NCUA*, 786 F.2d 621, 622-623 (4th Cir. 1986). See *Tax Analysts & Advocates* v. *Blumenthal*, 566 F.2d 130, 139 (D.C. Cir. 1977), cert. denied, 434 U.S. 1086 (1978). Cf. *Pierce County*, slip op. 7 n.7. As Professor Jaffe put it, if the persons that "the law chooses to protect are satisfied with the status quo through it may involve an alleged violation [of the law], why should a stranger have a right to insist on enforcement?" Jaffe, *Standing Again*, 84 Harv. L. Rev. 633, 637 (1971).[8]

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[8] By pretermitting litigation on the merits, the zone of interests test "permits government officials to act in furtherance of congressional purposes without the prospect of protracted court challenges from those whose interests Congress clearly did not protect." *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1116. In contrast, "full litigation would contemplate a group of participants and a forum of decision-making that Congress did not establish in the statutory program." *Id.* at 1111.

At the same time, application of the zone of interests limitation "ensure[s] the complete adversarial presentation of the issues before the court" (*Bank Stationers Ass'n* v. *Board of Governors*, 704 F.2d 1233, 1236 (11th Cir. 1983)); it is thus related to the general rule that a plaintiff must assert his own rights, rather than those of third parties. See *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975); *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1111. So far as the interests that Congress sought to protect are concerned, a litigant who falls outside the zone is, in substance, nothing more than a "'concerned bystander[].'" *Valley Forge*, 454 U.S. at 473 (quoting *United States* v. *Students Challenging Regulatory Agency Procedures* (*SCRAP*), 412 U.S. 669, 687 (1973)). Such a litigant is not ideally situated either to advance legal arguments or to develop a factual record that sheds light on the concerns that motivated Congress when it enacted the statute at issue. Consequently, in relation to the ends that Congress intended to accomplish in adopting the legislation, there is considerable danger that such a litigant's claims may not be presented in a "'context conducive to a realistic appreciation of the consequences of judicial action.'" *Bender* v. *Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 7 (quoting *Valley Forge*, 454 U.S. at 472). Cf. *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208, 221 (1974).

b. Because the inquiry in a zone of interests case focuses on the "critical relationship between congressional purpose and the plaintiffs' interests" (*Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1113),[9] that

[9] The Court has noted more generally that the question in all cases involving prudential limitations on standing "is whether

inquiry requires informed consideration of the legislative purpose. Resolving such a case accordingly requires use of the usual tools for discerning congressional intent: the statutory language and the legislative history. Not surprisingly, this Court, which has identified the relevant test as whether Congress "intended to protect" a given class of litigants (*Pierce County*, slip op. 7 n.7), has looked at those basic sources in its zone of interest cases. See *Arnold Tours, Inc.* v. *Camp*, 400 U.S. 45, 46 n.3 (1970); *Barlow* v. *Collins*, 397 U.S. 159, 164-167 & n.7 (1970). And the courts of appeals have agreed that a plaintiff, before satisfying the zone requirement, must produce "some indicia—however slight—that the litigant before the court was intended to be protected, benefitted or regulated by the statute under which suit is brought." *Copper & Brass Fabricators Council, Inc.* v. *Department of the Treasury*, 679 F.2d 951, 952 (D.C. Cir. 1982).[10]

Thus, the courts of appeals generally have

> recognized that in applying the zone test a court must discern whether the interest asserted by a party in the particular instance is one intended by Congress to be protected or regulated by the statute under which suit is brought. * * * Most

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the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief." *Warth*, 422 U.S. at 500 (footnote omitted).

[10] Because standing requirements "are threshold determinants of the propriety of judicial intervention," "[i]t is the responsibility of the complainant clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth*, 422 U.S. at 518.

> courts also acknowledge that the sources pertinent to this examination are the language of the relevant statutory provisions and their legislative history.

Control Data Corp. v. *Baldrige*, 655 F.2d 283, 293-294 (D.C. Cir.), cert. denied, 454 U.S. 881 (1981) (footnotes omitted). See, *e.g.*, *Branch Bank & Trust Co.*, 786 F.2d at 624-626; *Dialysis Centers, Ltd.* v. *Schweiker*, 657 F.2d 135, 138 (7th Cir. 1981); *Rodeway Inns of America, Inc.* v. *Frank*, 541 F.2d 759, 765-766 (8th Cir. 1976), cert. denied, 430 U.S. 945 (1977); *AFGE* v. *Dunn*, 561 F.2d 1310, 1321-1313 (9th Cir. 1977); *Bank Stationers*, 704 F.2d at 1236; *Copper & Brass Fabricators*, 679 F.2d at 952.

The Court also has taken a similar approach in related contexts. In determining whether a statute forecloses review of administrative action, for example—an inquiry that is closely associated with the zone of interests analysis (see, *e.g.*, *Data Processing Organizations*, 397 U.S. at 156-157)—the Court has held that "the preclusion issue turns ultimately on whether Congress intended for that class [of litigant] to be relied upon to challenge agency disregard of the law." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 347 (1984). And when addressing the related question whether Congress intended a statute to provide a litigant with a private cause of action, the Court has "plainly stated that [the] focus must be on 'the intent of Congress.'" *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 377 (1982), quoting *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981). See *California* v. *Sierra Club*, 451 U.S. 287, 297-298 (1981); *Universities Research Ass'n* v. *Coutu*, 450 U.S. 754, 770 (1981). In such cases, the Court has found the

surest sign of congressional intent to be the statutory language and legislative history. See *Daily Income Fund, Inc.* v. *Fox*, 464 U.S. 523, 535-536 (1984); *Sierra Club*, 451 U.S. at 297-298; *Touche Ross & Co.* v. *Reddington*, 442 U.S. 560, 575-576 (1979).

2. a. Here, the indicia of congressional intent uniformly show that respondent falls well outside the zone of interests protected by the Act. Section 36(c) (emphasis added)—the provision that respondent is attempting to enforce—on its face imposes limits on national banks that are measured entirely in terms of the conduct "authorized to *State banks*" by state law. As the Chief Justice has noted, the obvious implication of such language is that it "limit[s] branch banking of national banks specifically in order to protect state banks from the unrestricted competition of national banks." *National Ass'n of Securities Dealers* v. *SEC*, 420 F.2d 83, 106 (D.C. Cir. 1969) (Burger, J., concurring), rev'd on other grounds, 401 U.S. 617 (1971). This certainly suggests that Congress had no intention to protect or benefit securities brokers, or other competitors of national banks, when it passed the Act. Cf. *Community Nutrition Institute*, 467 U.S. at 346-347; *Barlow*, 397 U.S. at 164.

The legislative history of the Act confirms this conclusion. It establishes beyond dispute that the Act "was a response to the competitive tensions inherent in a dual banking structure where state and national banks coexist in the same area," and was designed to guarantee "that neither system have advantages over the other in the use of branch banking." *Plant City*, 396 U.S. at 131. Prior to the passage of the Act in 1927, the National Bank Act of 1864 had flatly barred national banks from establishing branches. See *First National Bank of Logan* v. *Walker Bank & Trust Co.*, 385 U.S. 252, 257 (1966);

First National Bank v. *Missouri*, 263 U.S. 640, 656 (1924). State banks, however, could branch as permitted by the laws of the individual states. This "intolerable" situation placed national banks at a "considerable disadvantage" (H.R. Rep. 83, 69th Cong., 1st Sess. 6-7 (1926))—so much so that many national banks were driven to surrender their national charters, or were forced out of business altogether. See *Walker Bank*, 385 U.S. at 257; S. Rep. 473, 69th Cong., 1st Sess. 7 (1926); 66 Cong. Rec. 1578, 1646 (1925) (remarks of Rep. McFadden); *id.* at 1580 (remarks of Rep. Wood); *id.* at 1631-1632 (remarks of Rep. Williams); *id.* at 1637 (remarks of Rep. Hull); *id.* at 1625, 1638 (remarks of Rep. Celler); *id.* at 4432 (remarks of Sen. Pepper).

By allowing national banks to branch, the Act was intended to "protect national banks from the unrestricted branch bank competition of state banks." *Plant City*, 396 U.S. at 131. See *Walker Bank*, 385 U.S. at 257-258. At the same time, Congress protected state banks by permitting national banks to branch only "in those cities where State banks are allowed to have [branches] under State laws." H.R. Rep. 83, *supra*, at 7.[11] The Act thus adopted what

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[11] As originally adopted, the Act permitted national banks to branch only in those cities where the bank had its main office. See Act of Feb. 25, 1927, ch. 191, § 2, 44 Stat. 1226. In 1933, Congress amended the Act to permit national banks (as well as state banks that are members of the Federal Reserve System) to branch statewide, if such branching is permitted to state banks by state law. See Act of June 16, 1933, ch. 89, § 23, 48 Stat. 189; *Walker Bank*, 385 U.S. at 259-260. This amendment "further strengthened the policy of competitive equality." *Plant City*, 396 U.S. at 132. See 76 Cong. Rec. 2511 (1933) (remarks of Sen. Glass); 77 Cong. Rec. 5862 (1933) (remarks of Sen. Long); *id.* at 5896 (remarks of Rep. Luce).

this Court and Congress repeatedly have characterized as a policy of "competitive equality" between national and state banks. See *Plant City*, 396 U.S. at 131-134, 136, 138; *Walker Bank*, 385 U.S. at 258, 261. As the Court has noted, the aim of fostering competitive equality was the "clearcut purpose [of the Act] * * * forcefully expressed by both friend and foe of the legislation at the time of its adoption" (*id.* at 261). See, *e.g.*, S. Rep. 473, *supra*, at 14; H.R. Rep. 83, *supra*, at 6-7; 66 Cong. Rec. 1580 (1925) (remarks of Rep. Wood); *id.* at 1582 (remarks of Rep. McFadden); *id.* at 1627 (remarks of Rep. Stevenson); *id.* at 1628, 1638 (remarks of Rep. Celler); *id.* at 1632, 1634 (remarks of Rep. Williams); *id.* at 1637 (remarks of Rep. Hull); *id.* at 1640 (remarks of Rep. Luce); *id.* at 4432 (remarks of Sen. Pepper); *id.* at 4435 (remarks of Sen. Glass); *id.* at 4508 (remarks of Sen. Couzens); 67 Cong. Rec. 8297, 8352 (1926) (remarks of Sen. Pepper); *id.* at 8352 (remarks of Sen. McLean).

This legislative history plainly establishes that, while respondent may benefit from the restrictions imposed by the Act, those benefits "are 'wholly incidental to the purpose and design of the program.'" *Dialysis Center*, 657 F.2d at 138 (quoting *Geriatrics, Inc.* v. *Harris*, 640 F.2d 262, 265 (10th Cir.), cert. denied, 454 U.S. 832 (1981)). See generally *Control Data*, 655 F.2d at 295. Thus, as Judge Scalia explained, "the brokerage houses suing in the present case are no more within [the zone of interests protected by the Act] than are businesses competing for the parking spaces that an unlawful branch may occupy." Pet. App. 6a.[12]

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[12] This example emphasizes the importance of the zone test in encouraging proper presentation of the relevant issues. Resolving a challenge under the Act may require difficult and

b. Against this background, the courts below relied on *Data Processing Organizations* and *Arnold Tours* to hold that respondent's claim falls within the zone of interests protected by the Act. But that reliance was misplaced. Those cases involved, respectively, challenges brought by data processors and by travel agents under Section 4 of the Bank Service Corporation Act, 12 U.S.C. 1864,[13] to rulings by the Comptroller permitting banks to offer data processing and travel services to their customers. In allowing the challenges to proceed, the Court in those cases held only that, in the face of congressional silence about who is to benefit from given legislative action, the zone test is satisfied when "Congress ha[s] arguably legislated against the competition that the [plaintiff seeks] to challenge." *Investment Co. Institute*, 401 U.S. at 620. See *Arnold Tours*, 400 U.S. at 46; *Data Processing Organizations*, 397 U.S. at 155-156. As the Court subsequently explained, its holdings in those cases amounted to a conclusion that Congress, in the Bank Service Corporation Act, "*had*

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complex calculations about the effect of given banking practices on the competitive equality of state and national banks. See generally *Independent Bankers Ass'n* v. *Marine Midland Bank*, 757 F.2d 453, 459-461 (2d Cir. 1985), petition for cert. pending, No. 84-2023; *Colorado ex rel. State Banking Board* v. *First National Bank*, 540 F.2d 497, 500 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1977). When, as in this case, the party bringing the challenge is not a participant in that competition, the record is less likely to contain adequate evidence bearing on what, if any, competitive effect the Comptroller's decision will have on state banks. Cf. *Bender*, slip op. 7.

[13] Section 1864 provides that "[n]o bank service corporations may engage in any activity other than the performance of bank services for banks."

provided competitor standing." *United States* v. *Richardson*, 418 U.S. 166, 176 n.9 (1974) (emphasis added). See *Investment Co. Institute*, 401 U.S. at 641 (Harlan, J., dissenting); *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1115.[14] Cf. *Pierce County*, slip op. 7 n.7.

Indeed, it was central to the Court's holding in those cases that the Bank Service Corporation Act had not been designed for the purpose of benefitting only a single group of bank competitors. The Court in *Arnold Tours* thus suggested that travel agents might have been foreclosed from bringing suit had there been "any legislative history showing that Congress desired to protect data processors alone from competition." 400 U.S. at 46 (footnote omitted). And the Court in *Data Processing Organizations* reaffirmed the holding of *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1 (1968), that a litigant may bring suit when he is "within the class of persons that the statutory provision was designed to protect." 397 U.S. at 155.[15] See *Glass Packaging Institute*, 737 F.2d at 1089.

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[14] The Court reached a similar conclusion in *Investment Co. Institute*, where it held that securities dealers had standing to contest rulings under the Glass-Steagall Act, a statute enacted to protect the public as a whole against the dangers that arise from the mixture of commercial and investment banking (see *Investment Co. Institute*, 401 U.S. at 639); the Court in that case found that "Congress had arguably legislated against the competition that the petitioners sought to challenge." *Id.* at 620. The Court used the same analysis in holding that a challenge to a burden on interstate commerce fell within the zone of interests protected by the Commerce Clause. *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318, 320-321 n.3 (1977). See *Tax Analysts & Advocates*, 566 F.2d at 142.

[15] The Court explained in *Hardin* that "competitive injury provide[s] no basis for standing" when "the statutory * * *

Here, as we explain above, there is no doubt that Congress had only one type of competitive injury in mind when it passed the Act—the type that national and state banks might inflict upon each other. Compare *Barlow*, 397 U.S. at 164-165. In these circumstances, there is no reason to depart from the congressional purpose, particularly when doing so would simply afford respondent's members a windfall and unintended protection from the normal competition of the marketplace. Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977); *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218 (1966). Instead, "[w]here Congress has * * * clearly defined the class to be protected, the zone test * * * prevent[s] groups outside of the class from usurping the legislative entitlement." *Leaf Tobacco Exporters Ass'n*, 749 F.2d at 1115. See *Branch Bank & Trust Co.*, 786 F.2d at 626; *Bank Stationers Ass'n*, 704 F.2d at 1235-1236; *Dialysis Centers*, 657 F.2d at 138; *In re Swearingen Aviation Corp.*, 605 F.2d 125, 127 (4th Cir. 1979); *Rodeway Inns*, 541 F.2d at 766; Jaffe, *supra*, 84 Harv. L. Rev. at 634. Cf. *Community Nutrition Institute*, 467 U.S. at 346-347.

This case differs from *Data Processing Organizations* and *Arnold Tours* in another respect as well. Had the plaintiffs in either of those cases been held to be outside the zone of interests, judicial review of the agency action would have been effectively precluded because no other party would have been entitled to bring suit. While that circumstance was not, of itself, sufficient to require a finding that the

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requirements that the plaintiff [seeks] to enforce were in no way concerned with protecting against competitive injury." 390 U.S. at 5-6.

plaintiffs had standing to sue (see *Valley Forge*, 454 U.S. at 489), in determining whether a litigant is within the congressionally intended zone of interests a court may properly consider whether its ruling would "effectively frustrate any challenge to the regulations in question." *National Ass'n of Securities Dealers*, 420 F.2d at 108 (Burger, J., concurring). See also Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 Yale L.J. 425, 472 (1974). Here, of course, denying respondent standing would not preclude judicial review of the Comptroller's branching decisions: state banks (and other national banks) historically have been vigilant in policing the Comptroller's application of the Act.[16] Cf. *National*

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[16] See *Plant City*, 396 U.S. at 129; *Walker Bank*, 385 U.S. at 255-256; *Independent Bankers Ass'n of America* v. *Heimann*, 627 F.2d 486 (D.C. Cir. 1980); *State Bank* v. *Heimann*, 619 F.2d 679 (7th Cir. 1980); *State Bank* v. *Merchants National Bank & Trust*, 593 F.2d 341 (8th Cir. 1979); *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976); *Driscoll* v. *Northwestern National Bank*, 484 F.2d 173 (8th Cir. 1973); *Hempstead Bank* v. *Smith*, 540 F.2d 57 (2d Cir. 1976); *First National Bank* v. *Camp*, 465 F.2d 586 (D.C. Cir. 1972), cert. denied, 409 U.S. 1124 (1973); *Springfield State Bank* v. *National State Bank*, 459 F.2d 712 (3d Cir. 1972); *North Davis Bank* v. *First National Bank*, 457 F.2d 820 (10th Cir. 1972); *Ramapo Bank* v. *Camp*, 425 F.2d 333 (3d Cir.), cert. denied, 400 U.S. 828 (1970); *Ohio Bank & Savings Co.* v. *Tri-County National Bank*, 411 F.2d 801 (6th Cir. 1969); *Union Savings Bank* v. *Saxon*, 335 F.2d 718 (D.C. Cir. 1964); *First-Citizens Bank & Trust Co.* v. *Camp*, 409 F.2d 1086 (4th Cir. 1969); *Mid-West National Bank* v. *Comptroller of the Currency*, 296 F. Supp. 1223 (N.D. Ill. 1968); *Commercial State Bank* v. *Gidney*, 174 F. Supp. 770 (D.D.C. 1959), aff'd, 278 F.2d 871 (1960).

Ass'n of Securities Dealers, 420 F.2d at 106 (Burger, J., concurring).[17]

B. Offices Of National Banks That Offer Only Discount Brokerage Services Are Not Branches Under The McFadden Act

The court of appeals also seriously erred in holding on the merits that national bank offices offering only discount brokerage services are branches within the meaning of Section 36(f). That holding will have a substantial and disruptive effect on the Na-

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[17] Respondent is not an appropriate party to advance the claims of state banks; "[n]o relationship, other than an incidental congruity of interest, is alleged to exist between" securities dealers and state banks. *Warth*, 422 U.S. at 510; see *id.* at 499. Similarly, although respondent had standing to raise (see note 3, *supra*) its Glass-Steagall claim (see *Investment Co. Institute*, 401 U.S. at 620), it cannot " 'borrow' the arguable regulatory or protective intent embodied in one [statute], and apply it to a [statute] where that intent is not evident, in order to satisfy the zone test." *Tax Analysts & Advocates*, 566 F.2d at 141. As this Court has made clear, standing "turns on the nature and source of the claim asserted" (*Warth*, 422 U.S. at 500), and "the source of plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing" (*ibid.*). Thus, "the particular statutory section [at issue] should be the focus of analysis when applying the zone test." *Tax Analysts & Advocates*, 566 F.2d at 141. See Pet. App. 7a (Scalia, J., dissenting). Indeed, the Glass-Steagall and McFadden Acts implicate wholly different policies and interests. The Glass-Steagall Act was intended generally to separate the business of commercial banking from the business of investment banking. See, *e.g.*, *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766 (June 28, 1984), slip op. 6-10. The geographical restrictions imposed by the McFadden Act, in contrast, established a policy of competitive equality for national and state banks in regard to branching.

tion's banking industry. It throws into question the propriety of the more than 60 applications from national banks seeking permission to engage in the discount brokerage business that currently are pending before the Comptroller. And because discount brokers charge low commissions and depend for their profits on a high volume of business (cf. *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 1 n.2; Pet. App. 11a), the court of appeals' ruling raises substantial practical barriers to the ability of national banks to compete with brokerage houses that are not subject to geographical limitations.

The court of appeals' construction of the Act also creates anomalous and disruptive distinctions *within* the banking industry. Under this Court's decision in *Securities Industry Ass'n* v. *Board of Governors*, *supra*, bank holding companies may offer discount brokerage services that are not subject to geographical restrictions. But that ruling cannot benefit the smaller and medium-sized national banks that are not affiliated with holding companies. The decision below, moreover, casts a cloud of uncertainty over the authority of *all* national banks to continue operating, without regard to the Act's branching restrictions, the hundreds of bank offices that offer nonbanking services to the public on an interstate basis (see pages 36-37, *infra*). Despite its wide impact, however, the court of appeals' ruling on the merits—which flatly rejected the reading of the statute by the agency charged with its administration—cannot be reconciled with the plain language of the Act, with its legislative history, or with settled practice in the banking industry.

1. a. This Court repeatedly has held "that the starting point for interpreting a statute is the lan-

guage of the statute itself[, and] [a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See *Board of Governors* v. *Dimension Financial Corp.*, No. 84-1274 (Jan. 22, 1986), slip op. 6. Here, the controlling statutory provision specifically defines the term "'branch' * * * to include any branch bank, branch office, branch agency, additional office, or any branch place of business * * * at which *deposits are received, or checks paid, or money lent.*" 12 U.S.C. 36(f) (emphasis added). As the Comptroller explained in detail (Pet. App. 39a-43a), discount brokerage offices perform none of these functions—and therefore cannot be deemed to be branches within the meaning of Section 36(f). When the statute speaks with such specificity, there is no room for the courts to substitute a different definition for the one chosen by Congress. See *Dimension Financial Corp.*, slip op. 6-7, 12; *United States* v. *Sisson*, 399 U.S. 267, 297-298 (1970). This is especially so when, as here, the agency administering the Act consistently has adhered to the statute's definitional terms.

Because the statute uses the word "include," the courts below evidently reasoned that the three enumerated functions that characterize a branch—receiving deposits, paying checks, and making loans —were intended by Congress only to be illustrative (see Pet. App. 26a-27a). Given the structure of the statutory definition, however, the approach taken below plainly is a misreading of Section 36(f): "[t]he term 'include' * * * does not relate to the activities involved but refers to the *places* at which the specified activities of receiving deposits, paying checks

and lending money are carried out. The places may include branch banks, branch offices, branch agencies, additional offices, mobile trucks [and] electronic devices." *Continental Illinois National Bank* v. *Illinois ex rel. Lignoul*, No. 76-C-2209 (N.D. Ill. Nov. 9, 1976), slip op. 17-18 (emphasis added) (*reprinted in* Gov't C.A. Br. Addendum C). The statutory language thus should have been dispositive.

b. The courts below nevertheless reasoned that the Act's legislative history justified their refusal to apply what they acknowledged to be the Comptroller's "literal reading of the statute" (Pet. App. 25a). In fact, however, the legislative background, to the extent that it sheds any light at all on the issue here, supports the conclusion that bank offices are subject to the Act's branching restrictions only when they perform one of the three functions enumerated in Section 36(f). Debate on the Act centered almost exclusively on the concern, expressed by both proponents and opponents of liberalized branching laws, that national banks might obtain monopoly control over "credit and money" if permitted to branch. 66 Cong. Rec. 4438 (1925) (remarks of Sen. Reed). See, *e.g.*, *id.* at 1569 (remarks of Rep. Nelson); *id.* at 1582 (remarks of Rep. McFadden); *id.* at 1624-1625 (remarks of Rep. Goldsborough); *id.* at 1628-1629 (remarks of Rep. Stevenson); *id.* at 1633 (remarks of Rep. Williams); *id.* at 1637 (remarks of Rep. Hull); *id.* at 1647 (remarks of Rep. Wingo); *id.* at 4437, 4506 (remarks of Sen. Reed); *id.* at 4527 (remarks of Sen. Heflin); 67 Cong. Rec. 2832 (1926) (remarks of Rep. McFadden); *id.* at 2839 (remarks of Rep. Goldsborough); *id.* at 2844 (remarks of Rep. Nelson); *id.* at 2850 (remarks of Rep. Steagall). It is, of course, through the receiving of deposits, cash-

ing of checks, and making of loans that the money supply and credit are controlled; not surprisingly, then, the congressional discussion about the appropriate scope of restrictions on branching referred only to bank offices that performed these functions. See, *e.g.*, 66 Cong. Rec. 1628 (1925) (remarks of Rep. Stevenson); *id.* at 4433 (remarks of Sen. Shipstead); *id.* at 1633 (remarks of Rep. Williams); *id.* at 4527 (remarks of Sen. Heflin); 67 Cong. Rec. 2855 (1926) (remarks of Rep. Kurtz).[18]

In contrast, during the three years that the Act was under consideration (see 66 Cong. Rec. 1581 (1925) (remarks of Rep. McFadden)), no suggestion was made that its branching restrictions would affect the *nonbanking* activities of national banks. And this omission was significant. Shortly after the enactment of the National Bank Act in 1864, this Court held that national banks *were* empowered to conduct

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[18] There is considerable evidence in the legislative history that the specific language of Section 36(f) was chosen as a response to the development of so-called "teller's windows," which were operated by national banks away from their main offices. While the legality of the teller's windows was far from clear (see generally *First National Bank* v. *Missouri*, *supra*; 67 Cong. Rec. 2860 (1926) (remarks of Rep. Celler)), the windows were used by many national banks in the 1920's to "pay checks and receive deposits." 66 Cong. Rec. 1627 (1925) (remarks of Rep. Stevenson); see *id.* at 4433 (remarks of Sen. Shipstead); 67 Cong. Rec. 2860 (1926) (remarks of Rep. Celler); 34 Op. Att'y Gen. 1, 5 (1923). Proponents of the Act explained that Section 36(f) was drawn in such a way as to treat the teller's windows—which were offering essential banking services—as branches. See 66 Cong. Rec. 1628 (1925) (remarks of Rep. Stevenson); *id.* at 1647 (remarks of Rep. Stevenson); *id.* at 4432 (remarks of Sen. Pepper); 67 Cong. Rec. 2860 (1926) (remarks of Rep. Stevenson).

operations that were incidental to the banking business away from their main offices. *Merchants' Bank* v. *State Bank*, 77 U.S. (10 Wall.) 604, 651 (1870). See also *Lowry National Bank*, 29 Op. Att'y Gen. 81, 87 (1911). Banks subsequently developed a substantial volume of such business—including, very notably, the buying and selling of securities. See pages 31-33, *infra*. As a statute generally designed to liberalize branching rules, it is hardly likely that the McFadden Act was intended, for the first time, to subject offices conducting these activities to regulation as branches.

c. The legislative background also makes plain that the omission of brokerage operations from the functions enumerated in Section 36(f) could not have been an oversight. At the time of the Act's enactment in 1927, "[i]t [was] a matter of common knowledge that national banks [had] been engaged in the investment-securities business * * * for a number of years." H.R. Rep. 83, *supra*, at 2. See S. Rep. 473, *supra*, at 7. Representative McFadden himself acknowledged that the buying and selling of securities had "become a recognized service which a bank must render." 66 Cong. Rec. 1585-1586 (1925) (remarks of Rep. McFadden).[19] Similarly, Congress was aware that these securities activities were not subject to the National Bank Act's bar on branching, and thus were conducted "to a very large extent

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[19] In testimony before the Senate Banking Committee, Representative McFadden explained that "national banks have for many years been engaged in the business of buying and selling investment securities without any restrictions whatsoever." *Consolidation of National Banking Associations: Hearings on S. 1782 and H.R. 2 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 69th Cong., 1st Sess. 22 (1926).

throughout the country." 67 Cong. Rec. 8351 (1926) (remarks of Sen. Pepper).[20]

Yet in the same legislative package in which it defined the term "branch" and established Section 36 (c)'s branching rules, Congress specifically confirmed the authority of national banks—previously exercised under their "incidental charter powers" (H.R. Rep. 83, *supra*, at 3)—"to continue to engage in the business of buying and selling investment securities." S. Rep. 473, *supra*, at 7. See Act of Feb. 25, 1927, ch. 191, § 2, 44 Stat. 1226[21]; H.R. Rep. 83, *supra*, at 2, 3. Had Congress intended to require that these activities be carried out only at licensed branches in the bank's state of incorporation, it presumably would have said so (cf. *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716, 721 (8th Cir. 1976) (Henley, J., dissenting), cert. denied, 433 U.S. 909 (1977)); that Congress discussed the securities business in one section of the statute while pointedly omitting it from Section 36(f) strongly indicates that

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[20] As these remarks indicate, bank involvement in the securities business prior to passage of the Act was widespread and often was conducted on an interstate basis. See, *e.g.*, W. Peach, *The Security Affiliates of National Banks* 74 (1941); Perkins, *The Divorce of Commercial and Investment Banking: A History*, 88 Banking L.J. 483, 492, 494 n.26 (1971). See also *Block* v. *Pennsylvania Exchange Bank*, 253 N.Y. 227, 232-233, 170 N.E. 900, 901-902 (1930).

[21] The legislation authorized national banks to engage in "the business of buying and selling investment securities." Banks were limited to buying and selling the securities "without recourse," and were prohibited from acquiring the securities of any one issuer in an amount that exceeded 25% of the bank's capital stock (§ 2, 44 Stat. 1226).

the omission was intentional.[22] See generally *Lawrence County* v. *Lead-Deadwood School District*, No. 83-240 (Jan. 9, 1985), slip op. 10; *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981); *Fedorenko* v. *United States*, 449 U.S. 490, 512 (1981); *Bates* v. *Brown*, 72 U.S. (5 Wall.) 710, 718 (1866). And again, there is no reason to assume that a statute designed both to confirm the authority of national banks to engage in the securities business and to liberalize branching rules also contained an unspoken intent to curtail dramatically the securities operations of those banks.[23]

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[22] That the Act was not intended to subject bank brokerage activities to geographic restrictions is demonstrated by its immediate effect: in the years after passage of the Act, banks continued to open and operate interstate securities offices. See W. Peach, *The Securities Affiliates of National Banks* 96-98 (1941). See also *Operation of the National and Federal Reserve Banking Systems: Hearings on S. Res. 71 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 71st Cong., 3d Sess. 1057 (1931). Although Congress was aware of this activity (see *ibid.*), it took no steps to restrict the locations at which banks could operate securities businesses when, in enacting the Glass-Steagall Act in 1933, it limited the *types* of securities activities in which banks could engage by separating investment from commercial banking. See 12 U.S.C. (& Supp. II) 24; 12 U.S.C. 78, 377, 378. To the contrary, Congress emphasized that the Glass-Steagall Act permitted banks "to purchase and sell investment securities for their customers to the same extent as heretofore." S. Rep. 77, 73d Cong., 1st Sess. 16 (1933). See *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 7.

[23] The district court's analysis of the legislative history was limited to consideration of a single post-enactment statement by Rep. McFadden, to the effect that " '[a]ny place outside of or away from the main office where the bank carries on its business of receiving deposits, paying checks, lending money,

d. The courts below also felt free to disregard the Comptroller's construction of Section 36(f) because they found it inconsistent with this Court's statement in *First National Bank in Plant City* v. *Dickinson*, *supra* (see Pet. App. 26a-27a) that

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or *transacting any business carried on at the main office*, is a branch * * *' " (Pet. App. 26a, quoting 68 Cong. Rec. 5816 (1927) (remarks of Rep. McFadden) (emphasis added by the court)). But the district court's reliance on this statement—which was inserted into the record 10 days after passage of the Act, while Congress was in adjournment—disregarded this Court's "oft-repeated warning that [post-enactment statements] form a hazardous basis for inferring" the intent of Congress. *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117 (1980). See *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 823 (1980). The language of the McFadden Act—like that of much legislation—"reflect[s] hard fought compromises." *Dimension Financial Corp.*, slip op. 12. See 66 Cong. Rec. 4526 (1925) (remarks of Sen. Pepper); *First National Bank of Logan*, 385 U.S. at 257-260. To allow Rep. McFadden's post-enactment statement to override the statutory language "would open the door to the inadvertent, or perhaps even planned, undermining of the language actually voted on by Congress and signed into law by the President." *Regan* v. *Wald*, No. 83-436 (June 28, 1984), slip op. 14. And there are especially compelling reasons here to be skeptical of Representative McFadden's statement. While the branching statute bears his name, Representative McFadden was in fact a determined opponent of branch banking, who would have required state banks to relinquish statewide branches and imposed significant limitations on branching by national banks. See 67 Cong. Rec. 2829, 2832 (1926) (remarks of Rep. McFadden). He thus had a clear interest in adding to the legislative record a broad definition of the term "branch." Indeed, Rep. McFadden's post-enactment remarks primarily demonstrate how easy it would have been for Congress to have adopted an all-encompassing definition of "branch" had it wished to do so.

> [a]lthough the definition [in Section 36(f)] may not be a model of precision, in part due to its circular aspect, it defines the minimum content of the term "branch"; by use of the word "include" the definition suggests a calculated indefiniteness with respect to the outer limits of the term. However, the term "branch bank" at the very least includes *any* place for receiving deposits or paying checks or lending money apart from the chartered premises; it may include more.

396 U.S. at 135 (emphasis in original). The Court in *Plant City* then held that two off-premises banking services owned and operated by a national bank—an armored car messenger service that received cash and checks for deposit and a stationary receptacle for customer deposits (see *id.* at 125-129)—were branches within the meaning of Section 36(f) because they "received * * * deposit[s]" (396 U.S. at 137).

On close examination, it is plain that the Comptroller's analysis here is entirely consistent with *Plant City*. To the extent that the language quoted above leaves open the possibility that branches may include bank offices other than those performing one of the three enumerated functions, the Court expressly declined to resolve the issue; its opinion was explicitly "confine[d] * * * to the question of whether deposits were received" at the challenged off-premises facilities (396 U.S. at 135). Indeed, if the Court had meant to hold that all bank offices are branches, its extensive consideration of the question whether the facilities at issue received deposits would have been unnecessary. See *id.* at 135-138.

Insofar as the *Plant City* dictum is relevant at all, then, it should be deemed "virtually dispositive in favor of the Comptroller" (Pet. App. 8a) (Scalia, J.,

dissenting) (emphasis omitted)). As Judge Scalia noted, a statute "containing a 'calculated indefiniteness' presents precisely the situation in which [a court's] deference to the agency should be at its height" (*ibid.*). See generally *United States* v. *Riverside Bayview Homes, Inc.*, No. 84-701 (Dec. 4, 1985), slip op. 7-8; *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845 (1984); *Board of Governors* v. *Investment Co. Institute*, 450 U.S. 46, 56 & n.21 (1981). And the "Comptroller's conclusion that discount brokerage houses do not fall within the range of indefiniteness —or indeed that the range includes *only* the enumerated functions—cannot by any means be considered unreasonable" (Pet. App. 8a-9a (emphasis in original)).

The deference due the Comptroller is reinforced by the fact that the court of appeals' novel reading of the statute would disrupt long settled practice in the banking industry. For many years, the Comptroller has permitted national banks to operate loan production offices, government and municipal securities offices, trust offices, credit card and record facilities, and similar operations—which do not carry on any of the three functions enumerated in Section 36(f) —on an interstate basis, without regard to the Act's branching limitations. See Pet. App. 44a. See generally 12 C.F.R. 7.7380; Whitehead, *Regional Forces for Interstate Banking*, Fed. Res. Bank of Atlanta Econ. Rev. 4, 17-18 (1983); Glidden, *The Regulation of National Banks' Subsidiaries*, 40 Bus. Law. 1299, 1304, 1315 (1985). See also page 37 & note 24, *infra*. Indeed, as of 1983, banks operated more than 200 loan production offices interstate. See Whitehead, *supra*, Fed. Res. Bank of Atlanta Econ. Rev. at 17.

The decisions below cannot be reconciled with this established practice. In these circumstances, "the longstanding administrative construction of the statute should 'not be disturbed except for cogent reasons' " of a sort that plainly have not been advanced here. *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 457-458 (1978) (quoting *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921)). Cf. *Securities Industry Ass'n* v. *Board of Governors*, No. 82-1766 (June 28, 1984), slip op. 21-22.

The legitimacy of these bank activities, moreover, has been confirmed by subsequent congressional action. When Congress was considering the International Banking Act of 1978 (IBA), Pub. L. No. 95-369, 92 Stat. 607 *et seq.*, the interstate operation of loan production offices repeatedly was called to Congress's attention.[24] And Congress specifically acknowledged the use of loan production offices by banks, noting that the existence of these offices and other multistate banking operations meant that "the avenues of interstate activity open to domestic banking organizations are significant." S. Rep. 95-1073, 95th

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[24] See, *e.g.*, 122 Cong. Rec. 24407 (1976) (statement of New York State Banking Department); *International Banking Act of 1977: Hearings On H.R. 7325 Before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 95th Cong., 1st Sess. 473-474 (1977) (statement of the Institute of Foreign Banks); *id.* at 556 (statement of George A. LeMaistre, Chairman, Federal Deposit Insurance Corporation); *id.* at 576 (statement of Robert Bloom, First Deputy Comptroller of the Currency); *Foreign Bank Act of 1975: Hearings on S. 958 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 509-510 (1976) (statement of the Institute of Foreign Banks).

Cong., 2d Sess. 8 (1978). See 124 Cong. Rec. 9081 (1978) (remarks of Rep. St Germain); *id.* at 9095 (remarks of Rep. Annunzio); 122 Cong. Rec. 24403 (1976) (remarks of Rep. Stephens). Congress accordingly noted that foreign banks, which are not subject to the McFadden Act's restrictions, had a competitive advantage over domestic banks primarily in that they were permitted "to receive deposits, make loans, and pay checks at banking offices located in several States"—a factor that took on particular importance because "the essence of banking is the ability to receive deposits." S. Rep. 95-1073, *supra*, at 8. See 122 Cong. Rec. 24403 (1976) (remarks of Rep. St Germain).

While Congress took steps in the IBA to assure the competitive equality of foreign and domestic banks (see 124 Cong. Rec. 9081 (1978) (remarks of Rep. St Germain); *id.* at 9082 (remarks of Rep. Reuss); *id.* at 9099 (remarks of Rep. Rousselot))—and simultaneously commissioned a study on the McFadden Act's applicability to "the present financial, banking, and economic environment" (§ 14(a), 92 Stat. 625)—it took no action to disapprove the multistate operation by national banks of offices conducting a nonbanking business. This sort of congressional acquiescence in the Comptroller's administrative practice suggests that the agency's interpretation of the scope of the Act's branching restrictions should be deemed authoritative. See, *e.g.*, *Connecticut Department of Income Maintenance* v. *Heckler*, No. 83-2136 (May 20, 1985), slip op. 7, 13; *United States* v. *Rutherford*, 442 U.S. 544, 554 (1979).

2. Even if the three functions enumerated in Section 36(f) are not the only ones that characterize branches, the courts below erred in holding that *all*

operations undertaken by banks—including *nonbanking* operations such as discount brokerage—must be conducted at branches. The three functions enumerated in Section 36(f), if not wholly dispositive, must have at least some bearing on the definition of the term "branch"; their inclusion in the statute otherwise would have been wholly superfluous. See *Exxon Corp.* v. *Hunt*, No. 84-978 (Mar. 10, 1986), slip op. 14; *Mountain States Telephone & Telegraph Co.* v. *Pueblo of Santa Ana*, No. 84-262 (June 10, 1985), slip op. 11.[25] What those functions have in common, of course, is each one's status as a "basic bank[ing] service[]" (*Plant City*, 396 U.S. at 137). See *Melton* v. *Unterreiner*, 575 F.2d 204, 207 n.4 (8th Cir. 1978) ("While many banks today perform a large number of services, basically the business of 'banking' consists of accepting deposits, cashing checks, discounting commercial paper, and making loans of money."); *Leuthold* v. *Camp*, 273 F. Supp. 695, 700 (D. Mont. 1967), aff'd, 405 F.2d 499 (9th Cir. 1969). As a result, courts have characterized the test of a branch

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[25] The district court thus erred in suggesting (Pet. App. 28a) that 12 U.S.C. 81—which provides that "[t]he general business of each national banking association shall be transacted in [its main office] * * * and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title"—confines all aspects of a bank's business to its main office or its branches. Such a reading renders Section 36(f) superfluous, and disregards Section 81's incorporation by reference of Section 36. In fact, Section 81 simply limits the places at which a bank may carry on its "general business," rather than the places at which it may conduct any of its business. See *Lowry National Bank*, 29 Op. Att'y Gen. at 87-88 (the "cases clearly indicate * * * a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business").

as whether the office at issue performs "routine banking function[s]" (*Illinois ex rel. Lignoul* v. *Continental Illinois National Bank & Trust Co.*, 536 F.2d 176, 178 (7th Cir.), cert. denied, 429 U.S. 871 (1976)) or "traditional banking transaction[s]." *Colorado ex rel. State Banking Board* v. *First National Bank*, 540 F.2d 497, 500 (10th Cir. 1976), cert. denied, 429 U.S. 1091 (1977). See also *Independent Bankers Ass'n of America* v. *Smith*, 534 F.2d 921, 943 (D.C. Cir.), cert. denied, 429 U.S. 862 (1976). Against this background, as the Comptroller explained, even the broadest reading of Section 36(f) must "at the very least be limited to those dealings with the public requiring a specialized banking or similar license" (Pet. App. 43a-44a).[26]

This distinction between basic bank services and the more peripheral activities that are performed by banks has been recognized in other contexts by Congress and the Court. In 12 U.S.C. (Supp. II) 24 Seventh, for example, Congress specifically included within the definition of the "business of banking" "discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; * * *

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[26] Although several courts have used broad language in describing the definition of "branch," to our knowledge only one court has held that a bank office performing a function other than one of the three enumerated in Section 36(f) is a branch. *St. Louis County National Bank* v. *Mercantile Trust Co.*, 548 F.2d 716 (8th Cir. 1976), cert. denied, 433 U.S. 909 (1977). In *St. Louis County National Bank*, a divided panel of the Eighth Circuit held that bank trust offices are subject to branching restrictions. While we believe that this decision was incorrect, it has an arguable basis in the fact that trust offices—unlike discount brokerage offices—do require the issuance of a special banking license from the Comptroller. See 12 U.S.C. 92a; 548 F.2d at 719-720.

receiving deposits; * * * buying and selling exchange, coin, and bullion; * * * loaning money on personal security; and * * * obtaining, issuing, and circulating notes." Cf. *Melton*, 575 F.2d at 207 n.4. The brokerage business is not included on this list of traditional banking activities. To the contrary, the next sentence of 12 U.S.C. (Supp. II) 24 Seventh separately authorizes national banks to undertake, to a limited extent, the "business of dealing in securities and stock." Similarly, this Court has upheld the right of bank holding companies to acquire discount brokerage firms under the Bank Holding Company Act (12 U.S.C. 1841 *et seq.*) because discount brokerage is a *nonbanking* activity that is " 'closely related' to banking." *Securities Industry Ass'n* v. *Board of Governors*, No. 83-614 (June 28, 1984), slip op. 8 (quoting 12 U.S.C. 1843(c)(8)).

There is thus little doubt that discount brokerage is not a traditional banking service. It could not seriously be suggested, for example, that Brenner Steed prior to its acquisition by Union Planters—or, for that matter, that respondent's members—engaged in the banking business by offering brokerage services. And the character of Brenner Steed's operations was not altered by its acquisition by Union Planters. In these circumstances, the Comptroller has set forth his reading of the statute with "commendable thoroughness" (*Securities Industry Ass'n*, No. 83-614, slip op. 8) and drawn a careful distinction between traditional bank services and discount brokerage operations (Pet. App. 43a-44a). This analysis should have been respected by the courts below.[27]

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[27] In rejecting the Comptroller's distinction and holding that *all* bank activities must be conducted at the bank's main office or its licensed branches, the court of appeals' decision

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1986

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imposes restrictions on national banks that were rejected by this Court more than 100 years ago. As noted above (at 19-20), the National Bank Act of 1864 originally limited a bank's conduct of its general business to its main office. In *Merchants' Bank* v. *State Bank*, *supra*, however, this Court flatly rejected the notion that *all* banking activities are confined to the bank's main office. The Court held that a national bank may certify a check away from its main office, reasoning that "[t]he business of every bank, away from its office * * * is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents." 77 U.S. (10 Wall.) at 651. Similarly, in *First National Bank* v. *Missouri*, *supra*, the Court cited with approval the Attorney General's "well considered opinion" (263 U.S. at 658) in *Lowry National Bank*, which had recognized that "[the] cases clearly indicate * * * a vital distinction between a mere agency for the transaction of a particular business and a branch bank wherein is carried on a general banking business." 29 Op. Att'y Gen. at 87.

APPENDIX

STATUTORY PROVISIONS INVOLVED

12 U.S.C. 36(c) provides:

> The conditions upon which a national banking association may retain or establish and operate a branch or branches are the following:
>
> A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks.

12 U.S.C. 36(f) provides:

> The term 'branch' as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

12 U.S.C. 81 provides:

> The general business of each national banking association shall be transacted in the place specified in its organization certificate and in the branch or branches, if any, established or maintained by it in accordance with the provisions of section 36 of this title.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1988 491507 20223